No. 78-80

In The

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

BAYLOR UNIVERSITY MEDICAL CENTER,

Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Robert W. Smith
Bowen L. Florsheim
SMITH SMITH DUNLAP & CANTERBURY
4050 First National Bank Bldg.
Dallas, Texas 75202

Of Counsel:
SMITH SMITH DUNLAP & CANTERBURY
4050 First National Bank Bldg.
Dallas, Texas 75202

TABLE OF CONTENTS

LIST OF AUTHORITIES

Cases

No. 78-80

In The

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BAYLOR UNIVERSITY MEDICAL CENTER,
Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, Baylor University Medical Center, respectively prays that the Petition For A Writ Of Certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 14, 1978, be denied.

OPINIONS BELOW

Petitioner correctly states the relevant opinions below. See Petition, Appendix A.

JURISDICTION

The jurisdictional requisites are set forth in the Petition (p. 2). This Court has jurisdiction under 28 U.S.C., §1255 (1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia was correct in finding that Respondent in this case presented evidence sufficient to show that application of Respondent's No-Solicitation and No-Distribution Rule to corridors and to Respondent's cafeteria and vending areas was necessary and proper to avoid disruption of health care operations and disturbance of patients.

STATUTE INVOLVED

The Petition correctly states and quotes the statute involved in this case.

STATEMENT

While Petitioner's statement of the case is generally accurate, it does omit certain significant points which Respondent believes should be before the Court in making its decision. The first among these points is the extent and nature of the evidence in this case. The portion of the case concerning Respondent's No-Solicitation and No-Distribution Rule and the reasonableness and necessity therefore consumed approximately two and one-half days. Respondent submitted testimony by ten witnesses, including hospital administrators, physicians and the clergy, such testimony filling several volumes. Respondent further submitted voluminous documentary exhibits of various kinds explaining the hospital,

its function and the special circumstances necessitating application of the Rule to those areas of the hospital frequented by patients and visitors. This is to be contrasted with other cases involving similar issues concerning no-solicitation and no-distribution rules such as *Beth Israel Hospital vs. National Labor Relations Board,* ..... U.S. ....., 98 S.Ct. 2463 (1978); and *St. John's Hospital and School of Nursing, Inc.,* 222 NLRB 1150 (1977), enf. den. 557 F. 2d 1368 (10th Cir. 1977) in which the evidence consisted of little more than limited stipulations of fact and in which evidence as to special circumstances was never really presented.

The evidence establishing the following was undisputed and uncontradicted. This evidence established that Respondent is the seventh largest hospital of the more than five thousand "acute care" private and charitable hospitals in the United States. Each year Respondent handles over 44,000 inpatients, 70,000 outpatients and 37,000 emergency patients. The hospital employs over 3,700 employees and has 750 physicians on its staff and 110 house staff members such as interns and residents. Each day up to 20,000 persons enter the hospital whether as visitors or patients. As described by one witness, the corridors are as crowded as the main streets of downtown Dallas.

Petitioner also failed to mention the extensive evidence presented by Respondent (which is unquestioned in the record) concerning Respondent's corridors, related waiting areas, cafeteria and vending areas. For example, as to the corridors and related waiting areas, the evidence showed that quick and unimpeded passage was *imperative* to the efficient operation of the hospital and that the hallways serve not only as passageways for patients,

visitors, doctors and equipment but also as viewing rooms for the nursery and storage areas for a variety of hospital emergency equipment. The testimony and other evidence also showed that the corridors were used extensively and directly for physical therapy purposes and transportation of patients to and from treatment. The evidence also showed that at times rapid and unimpeded movement in the corridors and hallways is a matter of life and death.

The evidence regarding the cafeteria and vending areas is equally unquestioned. At least forty percent (40%) of the customers in the cafeteria and vending areas are patients or visitors in the hospital. (Compare with the 9% visitor and 1.56% patient for Beth Israel). The physical arrangement of the cafeteria necessitates a mingling of employees, doctors, patients and visitors. The testimony, such as that of the hospital chaplain, also shows that patients and visitors are often consoled and counseled in the cafeteria. This is especially true as to visitors who are under stress and are frequently ministered to by members of the clergy in the cafeteria.

It is most important to understand that the foregoing descriptions constitute only a highlight of the voluminous evidence presented by the Respondent in this case.

These were the undisputed facts faced by the Court of Appeals on Respondent's Petition for Review. The Court of Appeals properly discharged its judicial function by reviewing the case on the evidence holding that the decision in *St. John's* did not establish any iron-clad rules and that each case must be considered on its own merits and particular facts.

REASONS FOR DENYING THE WRIT

The Petitioner bases its Petition on the assertion that the decision of the Court of Appeals is generally in conflict with this Court's decision in *Beth Israel Hospital v N.L.R.B.*, supra, and that the Court of Appeals supposedly erred in rejecting and refusing to apply the Petitioner's decision in *St. John's Hospital and School of Nursing Inc.*, supra. Petitioner also asserts that the Court of Appeals erred in applying a general restaurant and shop standard to Respondent's cafeteria and vending areas. The relief sought is a remand, not merely to the Court of Appeals but to Petitioner itself. As demonstrated below, the reasons asserted by Petitioner for its application for a Writ of Certiorari are without substance or validity.

Responden. submits that even the most cursory comparison of the decision of the Court of Appeals in this case with this Court's decision in the *Beth Israel* case demonstrates that the two do not conflict as to treatment of Petitioner's decision in *St. John's Hosital and School of Nursing Inc.*, supra. When considering this case, the Court of Appeals was presented by the Petitioner with the proposition that what we may call the "St. John's Rule" should be applied as a rigid and unyielding rule of law, applicable in all cases involving hospital no-solicitation and no-distribution rules. The Court of Appeals rejected this position in favor of a case by case consideration of the evidence, with the basic test being whether the hospital could demonstrate the unique circumstances necessary to justify the no-solicitation and no-distribution restrictions involved.

The action of the Court of Appeals in considering this case on its own merits and on the evidence presented is clearly in line with

the basic rules and principles laid down by this Court in *Beth Israel.* That general rule was stated as follows:

> "We therefore hold that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during non working time in non-working areas, *where the facility has not justified the prohibitions* as necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the Act." (Emphasis added) 98 S.Ct. at 2477.

The Court of Appeals in the instant case considered the evidence and found that there was not substantial evidence to support the Board's decision and Respondent had in fact presented uncontradicted and undisputed evidence justifying its No-Solicitation and No-Distribution Rule and that, in light of Respondent's showing, enforcement of the Board's Order was to be denied. Certainly this is within the decision in *Beth Israel.*

Overlapping the more general findings and points discussed above but nevertheless standing as a separate issue in this case is the Court of Appeals treatment of the Respondent's cafeteria and vending areas. Petitioner asserts and Respondent does not deny that the decision of the Court of Appeals which applied a commerical restaurant standard to the issue of Respondent's cafeteria and vending machine areas is in conflict with this Court's decision in *Beth Israel.* However, Respondent submits that whatever error may exist in that conflict it is not sufficient to justify granting the Petition for Writ in this case or in any way overturning the decision of the Court of Civil Appeals.

In considering the issue of the cafeteria and vending areas the Court of Civil Appeals certainly relied primarily on the general restaurant rules. However, the Court also recognized that:

> "Of course, there is not as much medical importance in maintaining the quietness or non-congestion of areas ordinarily removed from direct patient care as a public cafeteria or vending area, *but such areas in a hospital are not totally devoid of medical significance.*" (Emphasis added.)

While the Court of Appeals did not state that it relied directly on this particular standard, it is clear that the Court did recognize the application of the general rule later established in *Beth Israel* that just as with other areas of the hospital, a no-solicitation rule may be applied to cafeterias and vending areas where there is a proper evidentiary showing of justification. The evidence is clear in this case that such a showing was made. For example, as already noted, the undisputed evidence shows that at least 40% of Respondent's cafeteria customers are patients or visitors. As this Court itself noted, it was significant that in the *Beth Israel* case the evidence demonstrated that only 9% of the cafeteria's patrons were visitors and 1.56% were patients. The undisputed evidence in the instant case also establishes that there are no separate areas in the cafeteria for employees and that there is a necessary mingling of employees, patients and visitors. Perhaps most important is the undisputed testimony from professionals in the record in this case that the medical and psychological problems which exist among visitors and patients in the hospital cafeteria not only justify but necessitate application of the no-solicitation rule there. What the Court of Appeals rejected was the Petitioner's position that a no-solicitation rule is never justified in such areas.

A key factor in any case involving application of a no-solicitation rule to areas such as cafeterias is a question of whether employees have some place else to gather and carry on their union or other activities. This is an essential feature in balancing the interests of all involved, including the hospital, employees, patients

and visitors. Just as with the other factors discussed, the evidence presented by Respondent places this case in an entirely different position than the case faced by this Court in *Beth Israel Hospital v. NLRB,* supra. A comparison of the *Beth Israel* situation is best seen in a comparison of two quotations. The first is a finding from the decision of the National Labor Relations Board in *Beth Israel* which was quoted by this Court in its decision as follows:

> "[T]here are relatively few places where employees can congregate or meet on hospital grounds or in the nearby vicinity for the purpose of discussing non-work related matters other than in the cafeteria; secondly, the area in the neighborhood of the hospital is congested and provides no ready access to employees...." (98 S. Ct. at 2468).

This is to be compared with the undisputed evidence presented by Respondent in this case which is best summarized by the Court of Appeals as follows:

> "As regards the situation at Baylor, however, Petitioner has testified that its rule does not apply to any area outside the hospital building, and it is apparent that the hospital's parking lots, lawns and gardens supply an excellent forum for solicitation. These areas are heavily used by employees, many of whom eat their meals and take their breaks there. Thus despite the paucity of indoor areas available for solicitation, it is by no means the case — particularly in light of the mild climate in Dallas, which makes the outside areas available virtually all year — that the process of labor organizing would be crucially disadvantaged by limiting solicitation for the most part, to the out of doors." (Slip opinion p. 18)

Respondent submits that clearly there is no need to remand this case to the Court of Appeals or to the Board for consideration of evidence which is undisputed and clear in the record and which on its face meets the standards set by this Court.

Ultimately, it must be noted that what is in issue here is the question of enforcement or denial of enforcement of an order of the NLRB. The function of any Court of Appeals and of this Court in reviewing such an order is to determine whether there is substantial evidence to support the decision and order and in this case the Court of Appeals ruled emphatically that there was not substantial evidence. The Court of Appeals reviewed all of the evidence in this case and its finding *based on that evidence* are best stated by the Court itself as follows:

> "We find that the record evidence *compels* the conclusion in Baylor [Respondent herein] involves unique circumstances which justify a broad proscription on solicitation and distribution." (Pet. for Writ, App. 5a-6a) (Emphasis added)

And again in its conclusion, the Court of Appeals states:

> "In this case we feel that petitioner [Respondent herein] has adequately demonstrated that the well-being of patients and visitors and the operation of the hospital would be jeopardized by allowing solicitation in the corridors and wherever else patients or visitors have access." (Pet. for Writ, App. 24a)

Clearly, the Court of Appeals in this case made the ultimate determination that the Petitioner's decision and order was not supported by substantial evidence and that Respondent in this case did produce sufficient evidence to sustain its no-solicitation rule. In this regard, it must again be emphasized that the Petition for a Writ of Certiorari before this Court does not dispute or question a single evidentiary or fact point relied upon by the Court of Appeals. Thus, while the magic language might not have been used, the acid test of substantial evidence was the determining factor.

Finally, Respondent submits that Petitioner's request that the case be remanded directly to it is irrational in light of the earlier

proceedings of this case. The Petition for a Writ clearly indicates that if the case is remanded Petitioner would do nothing more than apply to the facts of this case the standards that it set in *St. John's Hospital and School of Nursing Inc.*, supra. This is exactly what both the Administrative Law Judge and the Petitioner itself did during their earlier opportunities to consider this case. Respondent must point out that such a remand would be an exercise in futility since Petitioner clearly would do nothing more than it has done before and that there can be nothing new for Petitioner to add to this case for consideration by the Court of Appeals or by this Court. The Court of Appeals reviewed the record and stated the facts — facts not disputed by Petitioner. Thus nothing remains to be done and nothing useful can be done by Petitioner. Petitioner seeks a Writ of Certiorari on the premise that the Court of Appeals supposedly applied the wrong rule of law to the undisputed facts. Respondent submits that the Court of Appeals in truth did nothing but deny enforcement of an NLRB order based on the substantial evidence standard, but if error there was it was one of law and for this Court or the Court of Appeals to correct and not for Petitioner.

CONCLUSION

This Court's decision in *Beth Israel Hospital v. N.L.R.B.*, supra, recognized the application of the basic rule that a hospital-employer may justify application of a no-solicitation and no-distribution rule in areas such as corridors, cafeterias, and vending areas and similar areas by making an evidentiary showing that the prohibitions are justified to avoid disruption of health care operations or disturbance of patients. Respondent presented such evidence, such evidence is clear in the record of this case, and

such evidence is undisputed and unquestioned. Respondent submits that it is most significant that in its Petition for a Writ of Certiorari, Petitioner does not dispute or question the existence of the evidence or the evidentiary findings made by the Court of Appeals. The Court of Appeals tested the Petitioner's order against the evidence and reached its decision "with due regard for 'the importance of the employer's interest in protecting patients from disturbance'." (Pet. p. 8)

In light of these circumstances the decision of the Court of Appeals is correct in denying enforcement of the Board's order and the ends of justice would not be served by the granting of this Writ or the remanding of this case for any purposes.

WHEREFORE, PREMISES CONSIDERED, Respondent BAYLOR UNIVERSITY MEDICAL CENTER, respectfully prays that this Court deny the Petition for Certiorari.

Respectfully submitted,

Robert W. Smith

Bowen L. Florsheim
SMITH SMITH DUNLAP & CANTERBURY
4050 First National Bank Bldg.
Dallas, Texas 75202
214/748-7051
Attorneys for Petitioner

Of Counsel:
SMITH SMITH DUNLAP & CANTERBURY
4050 First National Bank Bldg.
Dallas, Texas 75202
214/748-7051

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of August, 1978, true and correct copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari were served on the below listed persons by deposit in the United States Mail, certified, with sufficient postage thereon for delivery:

Wade H. McCree, Jr. Solicitor General of the United States Department of Justice, Washington, D.C. 20530

Mr. John S. Irving, General Counsel, National Labor Relations Board, Washington, D.C. 20570

Bowen L. Florsheim